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Happy Anniversary to the CPLR

A Joint Achievement of the Practicing Bar and the Academy

By Jay C. Carlisle

Introduction

This September, we celebrated the 50th anniversary of the Civil Practice Law and Rules of New York State. The CPLR was the handiwork of the Advisory Committee on Practice and Procedure, appointed in 1955 by the New York State Temporary Commission on the Courts. Under the leadership of the Committee's reporter, then Columbia Law School Professor Jack B. Weinstein, the Committee members, which included former New York State Bar Association presidents Jackson Dykman and S. Hazard Gillespie, spent five years overhauling, revising and reforming the Civil Practice Act of 1920. This remarkable joint venture between the practicing bar and the academy involved thousands of hours of detailed research, two full-day meetings a month, many public hearings, hundreds of draft reports, extensive debate, myriad hours of consultation with the bench and bar and, in 1961, submission of a final report to the Legislature. Although the Legislature did not adopt all of the Committee's proposals, the CPLR was enacted and became effective on September 1, 1963. This impressive document is one of the nation's oldest state procedural codes; it is appropriate to review its origins and to salute those involved in its creation.¹

Codification of Civil Procedure in New York State

Early procedural rules in New York were contained in The Revised Statutes of 1827/1828. Part III consisted of about 2,500 sections covering most of the substantive and procedural law relating to courts and practice in the Empire State.² Modeled on William Tidd's treatises on British civil practice, it became known as the Tidd Revisions.³

Twenty years after adoption of the Tidd Revisions, the Code of Procedure of 1848 was enacted by the Legislature.⁴ This code was the work of three commissioners who were appointed by the Legislature to revise and simplify the rules and practice for the state's courts.⁵ The Field Code, named in honor of its principal draftsman David Dudley Field,⁶ was further revised by these commissioners in 1850 but not adopted by the Legislature, although the revision was adopted in whole or in part by 30 states in the nation and the federal court system.⁷

For the next 30 years the bench and bar of New York vigorously debated the need for further procedural reform. Many were critical of the Legislature's failure to implement the 1850 revision of the Field Code. The Legislature passed a series of amendments to the Code until it was a "conglomeration of petty provisions purporting

to reach into every nook and cranny of practice and leading to an intolerable rigidity.”⁸ Protest by leaders of the bar led to legislative enactment of the Throop Revision, which became known as the Code of Civil Procedure. It consisted of a one volume accumulation of 3,356 detailed sections.⁹ This did not satisfy the bench and bar – it merely provided stimulus for further procedural reform.

In 1913, the Legislature directed the Board of Statutory Consolidation, chaired by Judge Adolph J. Rodenbeck, to conduct a thorough reform of civil procedure.¹⁰ In 1915, the Rodenbeck Board proposed a set of 401 rules;¹¹ this was rejected by the Legislature in 1919.¹² Thus, New Yorkers were left with the 1880 Throop Revision, which was characterized as a “patchwork” of disjointed laws and rules.¹³

In 1920, the Legislature adopted the Civil Practice Act.¹⁴ It made few changes in form or substance to the Throop Revision and “was little more than a recodification of the mass of detailed provisions added since 1848.”¹⁵ Momentum for change accelerated in 1938 with the enactment of the Federal Rules of Civil Procedure but the New York State Legislature had little interest in procedural reform. The Judicial Council, created in 1934,¹⁶ successfully sponsored piecemeal amendments to the Civil Practice Act¹⁷ but “was confronted with an overwhelming complex of archaic and disorganized statutes . . . ; the results of 100 years of constant petty amendment, addition and relocation, frequently accomplished with little regard for the whole.”¹⁸

The Advisory Committee on CPLR

Finally in 1955, the Temporary Commission on the Courts, chaired by Harrison Tweed, appointed an Advisory Committee on Practice and Procedure, naming Fordham Law School Dean John F.X. Finn as chair.¹⁹ After Dean Finn’s death, the Commission appointed as chair Colonel Jackson Dykman of Brooklyn. Other members of the Advisory Committee included S. Hazard Gillespie, Jr., of New York City; Professor Samuel M. Hesson of Albany Law School; former Federal Judge Harold M. Kennedy; Professor John W. MacDonald of Cornell Law School, chairman of the N.Y. Law Revision Commission; James V. Moore of Buffalo, former Solicitor General of New York State; Gilbert Hughes of Utica; George Coughlin of Binghamton; Austin W. Erwin, Jr., of Geneseo; Robert W. Jamison of Albany; and William L. Lynch, former Counsel to the Temporary Commission on the Courts. Committee members were selected to ensure full representation of upstate and downstate practitioners so that “the problems of every geographic area as well as every specialty”²⁰ would be addressed. Professor Jack B. Weinstein (now a U.S. Federal Judge in the Eastern District of New York) was appointed as reporter to the Committee. He was assisted by a staff of full-time academics from Columbia Law School, which included Daniel Distler, Harold Korn, and Milton Schubin. Distler and Korn

later became law professors at the University of Buffalo and Columbia Law Schools. The working staff received help from Columbia professors Maurice Rosenberg, Paul Hays, and Michael Sovern.²¹ Additional assistance in specific areas was provided by law school professors Louis Prashker of St. John’s, Thomas E. Atkinson of N.Y.U., David R. Kochery of Buffalo and Louis R. Frumer of Syracuse.²²

Reform Philosophy and Methodology

The Advisory Committee’s philosophy for procedural reform was summarized by its reporter as follows:

First: The test of procedure is the pragmatic one: does it work to permit substantive rights to be vindicated as quickly, inexpensively and justly as possible; is it flexible enough to permit justice to be done when procedure gets in the way of substance.

Second: We ought to preserve what is sound in the practice while taking advantage of the experience in this and other jurisdictions. In other words, change for change’s sake is as bad as avoidance of change just because it’s new; accordingly, we are examining each provision with our minds as well as our eyes wide open.

Third: The language and organization of the practice provisions should be easily understood so that lawyer and judge can readily determine what they are supposed to do.²³

Judge Weinstein and his academic working group defined the tests of procedural reforms as pragmatic ones. Does it work to permit substantive rights to be vindicated as quickly, inexpensively, and justly as possible? Is it flexible enough to permit justice to be done when form gets in the way of substantives? Is it easily understood and administered?²⁴

The first issue for the working group was whether to adopt in full or in part the Federal Rules of Civil Procedure. Arguments for adoption in whole included that the federal rules were relatively new; incorporated the best practices of the states, including New York; had proven successful in federal courts and courts of other states; and offered the prospect of uniformity under New York state and federal practice and the promise that practice courses would be easier to teach in New York law schools.²⁵ Arguments against adopting the federal rules in their entirety included their lack of coverage for many areas of state practice such as venue, statutes of limitations, evidence and enforcement of judgments.²⁶ More important, the Advisory Committee believed “their adoption would have required a considerable increase in the number of our [the state’s] employees.”²⁷ The Committee decided to adopt a hybrid approach.

Both uniformity of federal practice and retention of New York practice, while entitled to considerable weight, should . . . give way where we thought we

could develop a better rule or a modification of a present rule that would serve our purposes better.²⁸

Thus, the Committee followed many New York rules under the Civil Practice Act but tidied them up – both in language and organization. If a federal rule or rule of another state was better than New York’s practice, and there was no appreciable difference between the two, the working group gave nod to the federal rule.²⁹ This approach generated an enormous amount of work, as evidenced by the group’s published notes.

The academic working group identified 10 key areas of concern.

(1) easier acquisition of jurisdiction over parties outside the state; (2) free joinder of parties and causes of action; (3) greater exposure of facts before trial; (4) decreased emphasis on pleadings; (5) increased disposition on the merits rather than on procedural points; (6) increased responsibility of the courts to force attorneys to prepare for, and expedite disposition of, cases; (7) relaxation of the technical features in the law of evidence and greater stress on probative force; (8) increased power of appellate courts vis-à-vis trial courts; (9) improved devices for the enforcement of judgments; and (10) increased responsibility of judges for administering an integrated system of courts and procedure.³⁰

tions, evidence, arbitration, appeals, service, form and filing of papers, motions, pre-trial conferences, oaths and affirmations, trial by court and jury and referee; trial motions; infants, incompetents and poor persons; and actions against a body or officer.³³

The First Preliminary Report of the Advisory Committee, issued in 1957, was followed by succeeding interim reports in 1958, 1959, and 1960. Each report contained proposed rulings on various subjects and supporting critical statutes.³⁴ The revision as finally proposed appears in Advisory Committee on Practice and Procedure, Final Report (1961) and in the Sixth Report of the Senate Finance Committee for the Proposed Revision of the Civil Practice Act and Rules (1962).³⁵ The reforms of the New York procedure were classified under three general discussions: “formal rearrangement and manifold minor revisions of the existing rules of procedure; transfer of the principal authority for procedural rulemaking from the legislature to the courts; and adoption of certain major changes, notably broadened discovery machinery, the pretrial conference restriction of interlocutory appeal and some simplification of pleading.”³⁶

Legislative Response

The Advisory Committee’s first reform was enacted with minor revisions by the Legislature. The suggested new

Judge Weinstein and his academic working group defined the tests of procedural reforms as pragmatic ones.

The academic working group’s method consisted first of an examination of statutes, cases and literature in a particular field and a review of the experience of other jurisdictions. The group would confer and seek advice from outside specialists and then would issue a first draft to be edited and internally reviewed before submission to the full Advisory Committee. After further discussion, a record “tentative” draft was written and again submitted to the Advisory Committee, which often required as many as six separate drafts before authorizing publication. The Committee met for at least two full days every month to discuss, debate, criticize, and revise the draft reports. This exchange ensured a proper balance between the academics and the practitioners.³¹ Each published draft was marked “preliminary” and submitted to representative members of the bench and bar for comments, criticism, and suggestions. At least 30 bar associations regularly received the drafts. The first preliminary report was published in 1957; it covered venue, parties, joinders, pleadings, and disclosure.³² The second report, published in 1958, included drafts on jurisdiction, statutes of limita-

provisions of the CPLR were adopted and set forth in a logical and orderly sequence. This provided the bench and bar with an organized recitation of New York procedure and was an essential step for the continued reform of the CPLR in the 50 years subsequent to its adoption.³⁷

The second reform objective, conferring a general rule-making power on the courts, was almost completely frustrated by the Legislature.³⁸ The Advisory Committee had proposed that the judiciary have primary power to formulate and revise rules of procedure with the Legislature exercising supplemental authority.³⁹ The Legislature rejected this proposal which, in the opinion of one prominent commentator, did procedural reform an enormous disservice. Procedural rules need regular and expeditious review and revision. New rules not subject to the vagueness of legislative deliberation must be enacted without being subject to “political” considerations. The failure of the Legislature to recognize judicial rule-making power was a setback for the Advisory Committee.⁴⁰

Many of the specific major reforms proposed by the Advisory Committee were not enacted,⁴¹ but during the

past 50 years some of the Committee's proposals have been passed by the Legislature.⁴² In addition, the Legislature has adopted many innovative revisions to the CPLR that have enhanced the achievement of justice for the citizens of New York.⁴³ These changes reflect the letter and spirit of the Advisory Committee proposal.

Conclusion

Despite the Advisory Committee's failure to achieve many of its goals for procedural reform, the CPLR, as enacted in 1963, was an impressive document and an impressive achievement, realized through the efforts of the practicing bar and the academy. The CPLR has lasted longer than any prior procedural code in the Empire State; it is one of the nation's oldest codes of civil practice. It is unlikely the 1963 CPLR would have come to fruition without the joint labor of lawyers, judges, and academics. At least 30 bar associations were involved in the review and critique of Advisory Committee drafts. The bar's active involvement in the entire five-year CPLR working project is a reminder that procedural reform is impossible without the constant support and regular input of lawyers throughout the state. ■

1. David D. Siegel & Patrick M. Connors, *New York Practice* (5th ed.) (2013 Supplement) at iii ("This impressive document has now governed civil procedure in New York for five decades and has easily outlasted the 42 year tenure by the Civil Practice Act, which preceded it.").

2. William H. Manz, ed., *Gibson's New York Legal Research Guide* 3d ed. 194-96 (Hein 2004).

3. *Id.* at p. 194.

4. 1848 N.Y. Laws ch. 379 (amended form passed as 1849 N.Y. Laws ch. 438).

5. See Stephen N. Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 *Law & Hist. Rev.* 311 (1988).

6. *Id.*

7. See Thomas A. Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 *Fordham L. Rev.* 338, 339 (1955) ("... it was never adopted completely in New York. Instead, only the first and basic portion of the code, which Field himself later called the 'Field Fragment,' consisting of 473 sections was adopted by the New York Legislature in 1848 and 1849 – the balance was rejected. Instead many of the old 'Revised Statutes' of 1827 and 1828, which were more often than not attempts to codify the absurdities and complexities of common law pleading were continued in force and became part of the Code of Procedure [in 1880]."

8. *Id.* at 339 (citing Hon. Harold R. Medina, Transcript of Public Hearing before the Temporary Commission on the Courts held on June 22, 1954, in Brooklyn, N.Y., p. 133).

9. 1880 N.Y. Laws ch. 178.

10. 1913 N.Y. Laws ch. 713.

11. Report of Board of Statutory Consolidation on the Simplification of Civil Practice in New York, Vol. I (1915).

12. Report of the Joint Legislative Committee on Simplification of Civil Practice 29 (1919) Circuit Judge Charles E. Clark, former dean of Yale Law School and one of the principal authors of the Federal Rules of Civil Procedure, praised the Rodenbeck proposed legislation and remarked, "It contained to a surprising extent the provisions now widespread in operation through their adoption in the Federal Rules and elsewhere." See Charles E. Clark, *Field Centenary Essays*, 55, 62 (1949).

13. Jack B. Weinstein, *Revision of New York Civil Practice*, 30 N.Y.S. B. Bull. 298, 299 (July 1958).

14. 1920 N.Y. Laws ch. 925.

15. Weinstein, *supra* note 13, p. 298.

16. N.Y. Judiciary Law art. 2-A (1934), repealed by 1955 N.Y. Sess. Laws ch. 869, § 2.

17. See Shaw, *supra* note 7, p. 340.

18. *Id.*

19. See Weinstein, *supra* note 13, p. 299. See also Harrison Tweed, *The Temporary Commission Reports on the Courts*, 26 N.Y.S. B. Bull. 77 (Apr. 1954).

20. Weinstein, *supra*, note 13, p. 299 and Jack B. Weinstein, *Proposed Revision of New York Civil Practice*, 60 *Columbia L. Rev.* 50, 62 note 21 (1960).

21. Judge, then Professor, Weinstein, remarked, "The cost to the law school has been considerable. In addition to making space available . . . [t]he added burden to the library and mimeograph office has been substantial. Moreover, energy that might have been channeled into more directly productive scholarly work has been spent instead on the details of raising money, negotiating with officials, and placating lawyers and judges – all a part of the administrative burden of drafting a new practice." See Weinstein *supra* note 20, *Proposed Revision of New York Civil Practice*, p. 64.

22. *Id.* at pp. 60-64. See also Weinstein *supra* note 13, p. 300 (discussing academic component of Advisory Committee).

23. Weinstein, *supra* note 13, p. 301.

24. Weinstein, *supra* note 20, *Proposed Revision of New York Civil Practice*, p. 64.

25. *Id.* at pp. 53-54.

26. *Id.* at pp. 54-55.

27. *Id.* at p. 54 (for example, the adoption of the federal rules would require "[h]aving a clerk issue the summons in all cases and providing for service by a marshal . . . [and] requiring an added trip to the county clerk's office in all cases").

28. *Id.* at p. 55.

29. *Id.*

30. Jack B. Weinstein, *Trends in Civil Practice*, 62 *Columbia L. Rev.* 1430, 1434-35 (1962).

31. See Weinstein, *supra* note 21, p. 62 ("... the committee has devoted an average of two days a month to meetings . . . at which heated discussion and delightful anecdotes almost invariably resulted in a firm consensus").

32. Weinstein, *supra* note 13, p. 300.

33. *Id.* at p. 301.

34. Geoffrey C. Hazard, Jr., *New York Civil Practice*, 78 *Harvard L. Rev.* 1306 (1965). See also Advisory Committee on Practice and Procedure of the Temporary Commission of the Courts, First Preliminary Report (1957).

35. See Hazard *supra* note 34, p. 1308.

36. *Id.* at pp. 1307-08.

37. *Id.* at p. 1308.

38. *Id.*

39. See Advisory Committee on Practice and Procedure, Third Preliminary Report 452-65, 825-92 (1959).

40. Hazard, *supra* note 34, p. 1308.

41. *Id.*

42. See David D. Siegel & Patrick M. Connors, *New York Practice*, 5th Ed. (Supp. 2013) ("The bench and bar of New York State have been truly blessed to be the beneficiaries of Professor Siegel's guidance and insight during the entire reign of the CPLR" at iii). Professor Siegel's coverage of subsequent developments in the CPLR since 1963 represent his phenomenal devotion to a scholarly recitation of the CPLR's growth. His treatise contains an excellent summary of CPLR revisions, changes and new laws enacted during the last 50 years.

43. *Id.*